TAN CHOR THING

v.

TOKYO INVESTMENT PTE. LTD. & ANOR.

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[SUIT NO. 1844 OF 1989]
20 FEBRUARY 1991

SECURITIES: *Futures brokers - Trading without a licence - Entitlement to shares - Whether shares were pledged as security - Agents of overseas company - Whether underlying transactions illegal - Buying and selling order forms - Intention of Act - Lawful vs. unlawful orders - Definition of futures broker - Futures Trading Act [Sing], ss. 2, 11(1)(a), 11(1)(d), 22.*

Following investigation by the Criminal Investigation Department (CID) of the activities of the 1st defendant D1, the CID took possession of the share certificates, the said shares were owned by the plaintiff, P. D1 was charged under s. 11(d) of the Futures Trading Act for trading in the Hang Seng Index (HSI futures) without a licence - D1 had pleaded guilty in the criminal proceedings admitting that they had acted as a futures broker representative of the 2nd defendants D2.

P claimed the return of the shares; however D2 also claimed that they were the equitable owners of the shares and therefore entitled to retain them as security for the trading account of P's broker TCK in connection in the HSI futures.

On 27 July 1987, P entered into trading agreement with H to trade in Japanese red beans and on 3 September 1987, P pledged the shares to H as security for his trading amount. SLWL, a directior of H, managed P's account. P said that on 20 October 1987, he instructed H to close his trading account, settle the amount due and retain the shares which H did; however H only paid P on 2 November 1987 but P alleged that the shares were not returned to him.

D2 contend that on 20 October 1987, P allowed TCK to deliver the shares to SLWL to hold this as security for D2 for TCK's trading account with D2 who produced documents signed by TCK, amongst which was a pledge agreement dated 20 October 1987 in which D2 acknowledged receipt of the shares signed by SLWL on D2's behalf.

The Senior Assistant Registrar decided that P was entitled to the said shares, D1 and D2 appeal.

There was a triable issue as to whether P had consented to TCK pledging his shares to D2 - P contended that the pledge was illegal as the transactions were illegal under s. 11(1)(a) of the Futures Act (the Act), the defendants contended that the pledge was legal as it secured transactions which were legal.

Held:

[1] (a) On the evidence namely D2's printed buying and selling order forms signed by SLWL in Singapore in relation to TCK's transactions with D2, it is clear that D1 acted as D2's agent in carrying out the business of futures trading in Singapore; these documents were sufficient to prove that SLWL, whether as a director of D1 was taking, buying and selling orders from TCK as agent of D2;

(b) D1's plea of guilty was admissible to prove that D1 had carried on, illegally, the business of futures broker in Singapore. The said documents proved that they were carrying on such business as agents of D2. It was not necessary for P to rely on the admission of D1 in the criminal proceedings to prove the fact of agency against D2.

[2] (a) The Futures Trading Act clearly intended to regulate the carrying on of futures trading business in Singapore and to protect the public from dealing with unlicensed brokers in respect of futures in any unauthorised futures exchange within or outside Singapore;

(b) the Futures Trading Act clearly prohibits an unlicensed broker from entering into a brokerage contract for futures. Such contracts are not only distinctive, but they are the essence of the business concerned;

(c) Section 22 is intended to apply only to a situation where an existing licence is revoked or suspended, and not a case where the broker does not have a licence in the first place;

(d) on the evidence, D2 were carrying on the business of a futures broker in Singapore without a licence, through D1. Accordingly, the contracts which they had put through for TCK in Singapore were all illegal and all moneys due thereunder were irrecoverable.

[3] However, the shares were recoverable because:

(a) there was no evidence or any allegation of fact that P was aware that the transactions when entered into would be illegal or that TCK would be entering into illegal contracts with D2. Accordingly, there was no consideration for P's security and the shares must be returned to him;

(b) one of the objects of the Act is to protect that class of the public who trade in futures; as there was no allegation that P was in *pari delicto*, he was entitled to recover the shares as he falls within that class;

(c) the definition of "futures broker" has the effect of prohibiting an unlicensed broker from taking securities in connection with the soliciting or acceptance of orders for the buying or selling of futures. Accordingly, even if a security interest in the shares could pass to D2, they were not entitled to retain the shares.

[Appeal dismissed.]

Cases referred to:
Cope v. Rowlands [1836] 150 ER 707
Kiriri Cotton Co. Ltd. v. Dewani [1959] AC 192
Smith v. Lindo [1858] 141 ER 237
St John Shipping Corporation v. Joseph Rank Ltd. [1970] 2 QB 267
Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd. [1978] 53 ALJR 1

Legislation referred to:
Banking Act 1959, s. 8 [Sing]
Futures Trading Act (Cap 116) [Sing], ss. 2, 4, 11(1)(a), (d), 14, 22, (1), 24

For the plaintiff/respondent - Kenneth Tan
For the defendants/appellants - Choo Han Teck

JUDGMENT

Chan Sek Keong J:

This is an appeal by the defendants against the decision of the Assistant Registrar that the plaintiff was entitled to possession of 290,000 shares (the shares) of 7 Malaysian companies which were listed in the Stock Exchange of Singapore, damages and costs.

The plaintiff was the owner of the shares. At the date of commencement of this action, the share certificates were in the possession of the Criminal Investigation Department (the CID), they having been seized by the CID in the course of investigating the activities of the 1st defendants in November 1987. Following the investigation, the 1st defendants were charged under s. 11(1)(d) of the Futures Trading Act Cap. 116 for having, between 7 October 1987 to 26 October 1987, carried on the business of trading in the Hang Seng Index futures (HSI futures) without a licence. The 1st defendants pleaded guilty and was fined. In the statement of facts tendered to the Court, the 1st defendants admitted that they had acted as a futures broker representative of the 2nd defendants, a Hong Kong company, and was paid a service fee of $20,000 a month.

After the criminal proceedings, the plaintiff made a claim for the return of the shares. However, the CID was not prepared to deliver the shares to the plaintiff as the 2nd defendants had also claimed that they were the "equitable owners" of the shares and were entitled to retain them as security for the trading account of the plaintiff's broker, TCK, with them in connection with dealings in HSI futures.

The 2nd defendants' claim arose in the following circumstances. On 27 July 1987 the plaintiff entered into a trading agreement with a company called Heritage Commodities Pte Ltd. (Heritage) to trade in Japanese red beans. On or about 3 September 1987, the plaintiff pledged the shares with Heritage as security for his trading account. The person in Heritage who managed the plaintiff's account was one SLWL, a director of Heritage.

The plaintiff's version of the subsequent events as deposed in the affidavits filed by him was as follows: he instructed Heritage on 20 October 1987 to close his trading account, settle the amount due to the plaintiff and also return the shares; Heritage closed the account but did not pay him until 2 November 1987 when he was paid $100,404.40 being the amount due to him. He also signed an acknowledgment dated 2 November 1987 in which he certified that he had "no further claim or what-so-ever" against Heritage on the account. He alleged that the shares were not returned to him.

The 2nd defendants' version of how they came to take possession of the shares from Heritage as deposed in the affidavits filed by them was as follows: on 20 October 1987 when the plaintiff stopped trading with Heritage, he allowed TCK to deliver the shares to SLWL as a director of the 1st defendants to hold for the 2nd defendants by way of security for TCK's trading account with the 2nd defendants; that the plaintiff had signed a receipt for the shares (which the 2nd defendants admitted they could not produce); and that he closed his account later on 2 November 1987. The 2nd defendants produced in evidence the following documents signed by TCK with or in favour of the 2nd defendants (a) a customer's agreement dated 15 October 1987, (b) a pledge agreement dated 20 October 1987 in which the 2nd defendants acknowledged receipt of the shares, and (c) a list of the shares. Both the customer's agreement and the pledge agreement were signed by SLWL on behalf of the 2nd defendants. Since SLWL was not an officer or attorney of the 2nd defendants, he could only have signed the documents as a director of the 1st defendants.

TCK, whose evidence would have had a material bearing on the truth of the conflicting allegations of the plaintiff and of SLWL, did not file any affidavit in this action, nor was he made a party to these proceedings. However, it has to be pointed out that although the plaintiff claimed that the shares were not returned to him after the settlement of his account with Heritage, he did not allege that he had made any written or oral demand for the return of the shares after 2 November 1987. He has not given any explanation for allowing his shares to be in the possession of the 1st defendants until they were seized by the CID.

In the circumstances, Counsel for the plaintiff had to concede that there was a triable issue on whether his client had consented to TCK pledging his shares to the 2nd defendants. However, he contended that the pledge was illegal as the underlying transactions were illegal by virtue of s. 11(1)(a) of the Futures Act, and that the shares were recoverable from the 2nd defendants.

Counsel for the defendants submitted that the pledge was legal as it secured transactions which were legal. He contended that firstly, TCK's dealings with the 2nd defendants were effected in Hong Kong and not in Singapore, that although the 1st defendants had taken orders from TCK and placed them with the 2nd defendants in Hong Kong, he did so as agent of TCK. He said that the 2nd defendants were not TCK's brokers but that the 1st defendants were TCK's brokers. In this respect, he contended that the admission of the 1st defendants that they had acted as agents of the 2nd defendants was not admissible against his clients under the rule in *Hollington v. Hewthorn.* It was contended, secondly, that in any case the shares were not recoverable as the 2nd defendants were not aware that it was illegal for the 1st defendants to carry on the business of futures trading in Singapore without a licence. Counsel referred to the decision of the Exchequer Chamber in *Smith v. Lindo* [1858] 141 ER 237 where the Court had held that although an unlicensed broker in London could not sue for his commission by reason of s. 5 of 6 Ann. c. l6, he could recover money which he had paid on behalf of his client for bought shares. He also referred to *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd.* [1978] 53 ALJR 1, where the Australian High Court held that the respondents, an unlicensed bank, which had made a secured loan to the appellants were entitled to recover the loan.

So far as the facts were concerned, I found on the evidence that the 1st defendants acted as the agent of the 2nd defendants in carrying on the business of futures trading in Singapore. There was in evidence an admission by the 2nd defendants that the 1st defendants were their service agents in Singapore. This admission would not be sufficient to prove that the 1st defendants were trading in HSI futures in Singapore as the agents of the 2nd defendants. However, there was also in evidence copies of the 2nd defendants' printed buying and selling order forms duly signed by SLWL in Singapore with respect to TCK's transactions with the 2nd defendants. These documents in my view were sufficient to prove that SLWL, whether as a director of the 1st defendants, was taking buying and selling orders from TCK as agent of the 2nd defendants. These documents also showed the executed prices of the orders. Accordingly, these orders could not have been sent to Hong Kong for execution, but were probably executed by telephone or some other form of instant communication. Even if the orders had been executed in Hong Kong, they were solicited or accepted by the 1st defendants in Singapore. The 1st defendants' plea of guilty was admissible to prove that the 1st defendants had carried on, illegally, the business of futures broker in Singapore. The said documents proved that they were carrying on such business as agents of the 2nd defendants. It was not necessary for the plaintiff to rely on the admission of the 1st defendants in the criminal proceedings to prove the fact of agency against the 2nd defendants.

With respect to the issue of the legality of the transactions, the general principle of law is not in doubt. In *St John Shipping Corporation v. Joseph Rank Ltd.* [1970] 2 QB 267, Devlin J said (at p. 287):

> The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way: one must have regard to all relevant considerations and no single consideration, however important, is conclusive."

In the *Yango Pastoral* case, Gibbs ACJ said (at p. 2):

> There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits.

The High Court of Australia held that s. 8 of the Banking Act 1959 (Cth) which provided that no body corporate should carry on banking business unless it had a banking licence did not vitiate loans made by an unlicensed bank, having regard to the scope and object of the relevant provisions of the Act, and in particular to the heavy penalty imposed by that section (A$10,000 per day) on the corporate body. The Court held that s. 8 did not expressly prohibit an unlicensed bank from making a contract of loan nor could the prohibition be implied therefrom as the contracts that might be entered into in the course of banking business were so varied and not necessarily distinctive of the business. The decision of *Yango Pastoral* was based on the construction of the relevant statute.

Smith v. Lindo was, in my view, of no assistance to the defendants. In that case, the broker sued to recover money which he had paid on the client's behalf in the course of his employment of broker for shares which the broker had bought. The Court held that although the statute forbade an unlicensed broker from claiming his commission, there was nothing illegal in his paying for shares which the client had impliedly authorised him to pay, and further, there was no duty on the part of the broker to pay for the shares.

On the other hand, in *Cope v. Rowlands* [1836] 150 ER 707, Parke B held that 6 Anne. c. 16 impliedly prohibited a brokerage contract entered into by an unauthorised person and rendered it illegal and void. At p. 710, Parke B said:

> And it may be safely laid down, notwithstanding some *dicta* to the contrary, that if the contract be rendered illegal, it can make no difference; in point of law whether the statute which makes it so has in view the protection of revenue, or any other object. The sole question is whether the statute means to prohibit the contract...the question for us now to determine is, whether the enactment of the statute 6 Ann c. 16...is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to pay a penalty if he does not pay it? or whether one of its objects is the protection of the public, and the prevention of improper persons acting as brokers. On the former supposition, the contract with the broker is not prohibited by the statute; on the latter it is: for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing.

In the *Yango Pastoral* case, Mason J explained that the above passage was not applicable for the purpose of construing the object of s. 8 of the Banking Act on the ground that brokerage contracts were distinctive of brokerage contracts, whereas a mortgage loan was not necessarily distinctive of banking business which was varied in character.

So far as the Futures Trading Act is concerned, I was of the view that it clearly intended to regulate the carrying on of futures trading business in Singapore and to protect the public from dealing with unlicensed brokers in respect of futures in any unauthorised futures exchange within or outside Singapore. The expression "futures broker" is defined in s. 2 of the Act as follows:

> a person whether as principal or agent who carries on the business of soliciting, or accepting orders, for the purchase or sale of any commodity under a futures contract on any Exchange or futures market and, who in connection therewith, accepts any money, securities or property

(or extends credit in lieu thereof) to margin, guarantee or secure any trades or contracts that may result therefrom whether or not the business is part of, or is carried on in conjunction with, any other business.

The expression "Exchange" is defined as follows:

(a) the Singapore International Monetary Exchange Ltd; or

(b) a body corporate:

(i) that provides or proposes to provide the physical facilities necessary for trading in futures contracts; and

(ii) that maintains or proposes to maintain a futures market that is approved by the authority under s. 4.

Section 11(1)(a) provides as follows:

11(1) Subject to any regulations made under this Act, no person, whether as principal or agent, shall:

(a) carry on business as a futures broker:

(i) unless such person is a licensed broker under this Act; and (ii) trades in accordance with the business rules and practices of an Exchange or futures market on which trading takes place.

(3) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $30,000 or to imprisonment for a term not exceeding 3 years or to both.

Section 14 gives the MAS the discretion to grant or renew a broker's licence, exercisable by reference to the financial condition and good character of the applicant to safeguard the interest of members of the public who buy and sell futures in SIMEX or any other authorised Exchange. Section 24 restricts the discretion of the monetary authority of Singapore to grant a licence where the applicant cannot meet the minimum financial requirements prescribed by the MAS or the approved Exchange.

In my view, the Futures Trading Act clearly prohibits an unlicensed broker from entering into a brokerage contract for futures. Such contracts are not only distinctive, but they are the essence of the business concerned. However, Counsel for the defendants contended that s. 22 of the Act carried the implication that transactions entered into by a broker without a licence were valid and enforceable. Section 22 provides as follows:

22(1) A person whose licence is revoked under s. 20 or revoked or suspended under s. 21 shall, for the purpose of this part, be deemed not to be licensed from the date that the authority revokes or suspends the licence, as the case may be.

(2) A revocation or suspension of a licence of a person shall not operate so as to:

(a) avoid or affect any agreement, transaction or arrangement relating to the trading in futures contracts entered into by such person, whether the agreement, transaction or arrangement was entered into before or after the revocation or suspension of the licence; or

(b) affect any right, obligation or liability arising under any such agreement, transaction or arrangement.

I did not accept this argument. I agreed with Counsel for the plaintiff that s. 22 is intended to apply only to a situation where an existing licence is revoked or suspended, and not a case where the broker does not have a licence in the first place. Section 22 specifically refers

to the effect of a revocation or suspension on contracts entered into before or after the date of revocation or suspension. It deals with a special situation of revocation or suspension. By implication, a situation where a broker does not have a licence at inception should have the opposite consequence. If not, the legal effect is to be determined by established principles of law.

On the evidence, the 2nd defendants were carrying on the business of a futures broker in Singapore without a licence, through the 1st defendants. Accordingly, the contracts which they had put through for TCK in Singapore were all illegal and all moneys due thereunder were irrecoverable.

With respect to the issue of the recoverability of the shares, Counsel for the plaintiff submitted that the shares were recoverable as the plaintiff did not know that TCK's transactions were illegal. Counsel for the defendants merely contended that leave to defend on this issue should be given. Neither Counsel cited any authority.

In my view, the shares were recoverable on a number of grounds. Firstly, the plaintiff, assuming he had consented to the shares being used by TCK as security for his futures dealings with the 2nd defendants, was in the position of a guarantor of the liabilities of TCK to the 2nd defendants to the extent of the value of the shares. The consideration for the security was that the 2nd defendants would carry out the buying and selling orders of TCK. This must imply the carrying out of **lawful** and not **unlawful** orders unless the plaintiff had agreed or accepted otherwise. There was no evidence or any allegation of fact before me that the plaintiff was aware that the transactions when entered into would be illegal or that TCK would be entering into illegal contracts with the 2nd defendants. Accordingly, there was no consideration for the plaintiff's security and the shares must be returned to him.

Secondly, one of the objects of the Futures Trading Act is to protect that class of the public who trade in futures. As there was no allegation that the plaintiff was in *pari delicto,* he was also entitled to recover the shares on this ground: *Kiriri Cotton Co. Ltd. v. Dewani* [1959] AC 192.

Thirdly, the statutory definition of "futures broker" includes a person who, in connection with the carrying on of his business of futures trading, accepts securities to margin, guarantee or secure any trades or contracts that may result therefrom. In my view, this definition has the effect of prohibiting an unlicensed broker from taking securities in connection with the soliciting or acceptance of orders for the buying or selling of futures. Accordingly, even if a security interest in the shares could pass to the 2nd defendants, a point which I need not decide, they were not entitled to retain the shares.

For the above reasons, the appeal of the defendants was dismissed with costs.

Also found at [1991] 2 CLJ 1059